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Innocence Protection Act: Death Penalty Reform on the Horizon

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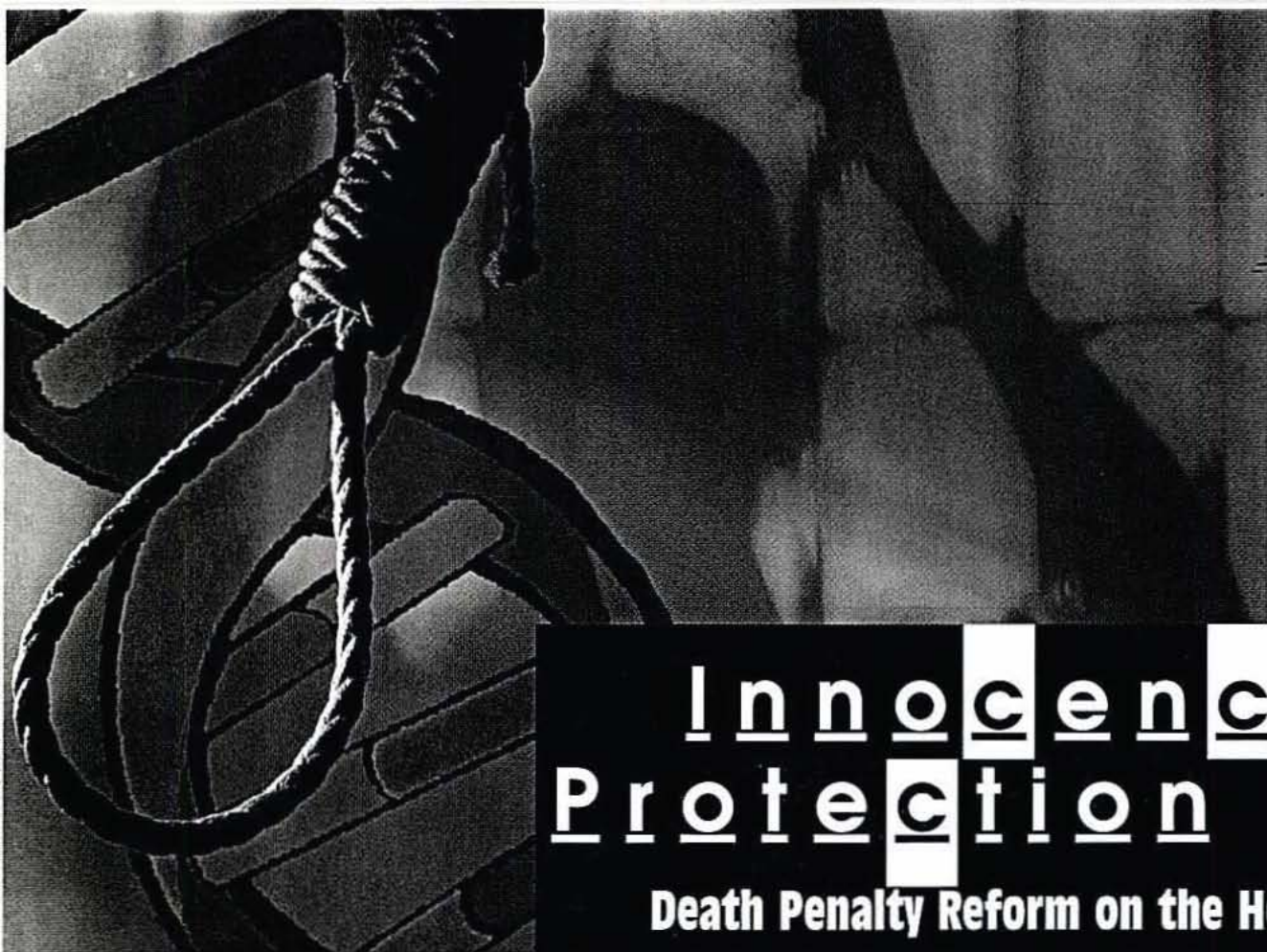
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Innocence Protection Act

Death Penalty Reform on the Horizon

The criminal justice pendulum may be swinging back in the direction of fairness. The Innocence Protection Act of 2001, introduced in both the Senate and the House of Representatives earlier this year, promises meaningful reforms in the administration of capital punishment in the United States.

Unlike previous stabs at reform, the Innocence Protection Act (IPA) has a real chance to become law because it commands unusually broad bipartisan support. The Senate bill (S. 486) is sponsored by Democrat Pat Leahy of Vermont and Republican Gordon Smith of Oregon. The House bill (H.R. 912) is sponsored by Democrat Bill Delahunt of Massachusetts and Republican Ray LaHood of Illinois. As of March, the bill was co-sponsored by 15 Senators, 4 of them Republicans, and by an astounding 175 House members, 20 of them Republicans. Never before in recent history have so many members of Congress from both parties gone on record in support of strengthening procedural protections for capital defendants.

Nor is this just a round-up of the usual suspects. Both Leahy and Delahunt are former prosecutors, and the list of co-sponsors includes such relatively conservative members as Senator Joe Lieberman of Connecticut, Congressman Joe Scarborough of Florida and Congressman Chris Smith of New Jersey. Can Senate and House Judiciary Committee Chairmen Orrin Hatch (R-UT) and James Sensenbrenner (R-WI) be far behind?

This article describes how we arrived at this surprising political moment, summarizes the IPA, and analyzes the prospects for its enactment.

Path to Reform

A few years ago, opponents of the death

penalty and those concerned about fairness in its administration were on the ropes. In 1994, Congress passed a crime bill that authorized capital punishment for more than 50 additional federal offenses. In 1996, a bill called the Anti-Terrorism and Effective Death Penalty Act became law and eviscerated federal *habeas corpus* review. The same year Congress wiped out federal funding for the Death Penalty Resource Centers that had scratched out a modicum of post-conviction fairness in key Death Belt states.

I worked for Senator Kennedy in those years, and I can report that the mood on the Senate floor was harsh and unforgiving. Members of Congress wanted more and faster executions, and had little concern for procedural niceties like competent counsel or federal review of the constitutionality of death sentences. Even the Great Writ fell victim to cries for vengeance following the Oklahoma City bombing.

What has happened in the five years since 1996 to alter the political landscape can be summarized in three letters: DNA.

As NACDL members know, advances in the study of human biology over the last decade have revolutionized the practice of criminal law. It is now possible to identify criminals with far greater precision than ever before based on analysis of blood, semen or other biological material left behind at a crime scene. While DNA technology has helped the police catch criminals, it has also exposed a national crisis in the administration of capital punishment by enabling investigators to exonerate defendants convicted long-ago. More than any other factor, these exonerations have caused a major shift in public attitudes toward the death penalty.

Since the Supreme Court permitted

By Ronald Weich

states to resume capital punishment in 1976, approximately 700 people have been executed in the United States. During the same time, according to the Death Penalty Information Center, 95 people sentenced to death have been exonerated — almost one for every seven executed. The truth is that most of these death row prisoners have been exonerated by evidence other than DNA testing, but at the same time many non-capital defendants have been exonerated by DNA testing. The two classes of prisoners often become confused in media reports, but the public is left with the entirely accurate perception that lots of demonstrably innocent defendants are sentenced to death.

Of course DNA testing merely provides a window onto otherwise hidden problems in the criminal justice system such as unreliable eyewitness testimony, undue reliance on jail house snitches and misconduct by law enforcement officials. While these problems contaminate non-capital as well as capital cases, the specter of the government executing an innocent man has captured the attention of the public and galvanized policy-makers.

At the same time that DNA exonerations have shaken public confidence in the criminal justice system, death penalty reformers have adopted new, more pragmatic strategies. To be sure, there are many strong voices still seeking abolition of the death penalty on moral or other grounds. But others have taken up the modest call for a moratorium on executions while flaws in the system are studied and fixed. Moratorium proponents achieved a huge victory in Illinois, where Republican Governor George Ryan declared a halt to executions while a blue-ribbon commission investigates the problems that have led to numerous exonerations in that state.

Still other reformers have advocated the adoption of specific statutory protections for defendants so that erroneous convictions or unjust sentences might be prevented at the outset. One such organization is The Justice Project, a national, non-partisan organization working to improve the criminal justice system through public education and advocacy. I serve as legislative counsel to the Project, which was formed just over a year ago. Some of the individuals associated with The Justice Project favor capital punishment and others oppose it. But we are united in the view that if the government intends to seek the ultimate

sanction against a defendant, it must afford that individual every procedural safeguard to assure the reliability of the fact-finding process.

The centerpiece of The Justice Project's agenda is the Innocence Protection Act, federal legislation to reform capital punishment procedures in the United States. The Justice Project has worked closely with the sponsors of the IPA, promoting enactment of the bill through lobbying, advertising, polling and the mobilization of grass roots support. The Project also supports similar reforms at the state level, serving as a clearinghouse and a resource to legislators on various criminal justice reforms.

Some have questioned whether the Innocence Protection Act and related reform efforts undermine the death penalty abolition movement. It is true that adoption of serious death penalty reforms would bolster the reliability of the system and thereby blunt abolitionist arguments based on erroneous convictions, although the moral arguments would remain.

On the other hand, groups such as The Justice Project which publicize flaws in the administration of capital punishment have facilitated a national debate about the justice system that benefits other advocacy efforts.

In any event, adoption of these reforms — especially the establishment of federal counsel standards — are a moral imperative because they would spare many defendants from unjust conviction or sentencing. Reformers of all stripes should welcome a proposal that would constitute such an important step forward for fairness in the criminal justice system.

Overview of the IPA

The twin pillars of the Innocence Protection Act are expanded access to post-conviction DNA testing and establishment of federal counsel standards in capital cases. The bill would make DNA testing available to federal and state prisoners in capital and non-capital cases, and would require states to comply with federal standards for the appointment of defense attorneys in capital cases.

Title I of the bill concerns DNA testing. First, the bill provides federal inmates with access to post-conviction DNA testing, notwithstanding any statute of limitations or other procedural bar to relief. An applicant would be required to show that the proposed DNA testing has the scientific potential to pro-

duce new, non-cumulative evidence material to the claim of the applicant that the applicant did not commit either the crime of which the applicant was convicted or, in some cases, an offense that the sentencing authority relied upon. Thus DNA testing would be authorized if it might prove that the defendant did not commit a murder, or if it might prove that the defendant did not commit a rape which was the aggravating factor that led to imposition of a death sentence for murder.

While establishing a sensible legal threshold that will weed out frivolous requests for DNA testing, the drafters of the IPA have avoided unnecessary obstacles of the kind found in some state post-conviction DNA laws. For example, there is no requirement that DNA technology have been unavailable at trial, since procedural default rules are absurd when applied to a defendant with a credible claim of innocence. Similarly, there is no requirement that the applicant demonstrate that identity was an issue in the trial. Defendants suffering from mental retardation or mental illness may actually confess and plead guilty to crimes they did not commit, and must not be denied access to post-conviction DNA testing that reveal their innocence. Also, unlike some state laws, the IPA covers DNA testing in both capital and non-capital cases.

Significantly, the IPA also imposes on the federal government a duty to preserve biological evidence while any person remains subject to incarceration in the case. The government may only destroy such evidence after providing ample notice and an opportunity for the inmate to seek scientific testing. This is, of course, a dramatic improvement over current practice in which evidence is not routinely preserved.

The bill then bootstraps procedural protections for state inmates from the



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protections provided to federal inmates. As a condition of receiving federal funding, a state would be required to make DNA testing available to its prisoners in a manner consistent with the new federal statute, and would be required to preserve evidence for not less than the period of time that the evidence would be required to be preserved if it were related to a federal crime. If enacted, this would be a rare and welcome instance of Congress using its financial clout to leverage procedural protections for state prisoners.

While it seems likely that states will accept this financial inducement to provide DNA testing to deserving inmates, the bill employs an additional enforcement mechanism: the IPA invokes Congress' authority under Section 5 of the 14th Amendment to require that, in capital cases only, states must provide a forum for prisoners to present new, non-cumulative DNA results "that establish a reasonable probability that the prisoner did not commit" the offense. Here again, enactment of the IPA would represent a rare invocation of congressional authority to protect convicted criminals from unconstitutional treatment in state court.

NACDL members can fully appreciate the momentous nature of that development, should it transpire.

While title I of the IPA tackles the much-publicized problem of access to DNA testing, title II seeks to redress the flaw that underlies so many of the wrongful convictions revealed by DNA testing: incompetent counsel.

Section 201 of the bill establishes a National Commission on Capital Representation and directs it to "formulate standards specifying the elements of an effective system" for providing representation to indigent capital defendants at trial and in post-conviction proceedings. Building on proposals put forward by the American Bar Association and other organizations over the past two decades, the bill mandates that the elements of an effective system include a centralized and independent appointing authority and adequate compensation of attorneys based on local market rates.

The bill establishes two powerful mechanisms for encouraging states to comply with federal counsel standards. First, states receiving prison construction funding would be required to comply with the standards as a condition of further federal funding. Second, in federal habeas proceedings a state could not rely

on procedural default rules or the presumption that state court findings of fact are correct if the state failed to provide representation pursuant to a system that complies with the federal requirements. These penalties would not apply retroactively.

To help states comply with the federal counsel standards, the bill authorizes a new \$50 million grant program to be administered by the State Justice Institute. In addition, the Administrative Office of the U.S. Courts is authorized to revive its grants to organizations that will function like the old Death Penalty Resource Centers.

Title III of the IPA contains a series of miscellaneous reforms beyond DNA testing and competent counsel:

- Section 301 of the bill increases the amount of compensation authorized to be paid to exonerated federal prisoners and Section 302 directs states to do the same as a condition of federal funding.
- Section 303 of the bill requires the Attorney General to certify that the federal interest in a prosecution is more substantial than the state or local interest before seeking the death penalty, a provision designed to limit the practice of United States Attorneys asserting federal jurisdiction over garden variety murder cases to overcome state laws that do not authorize the death penalty.
- Section 304 makes clear that federal juries may always recommend life imprisonment without parole, an option that was unclear under the capital punishment provisions of the 1988 Omnibus Anti-Drug Abuse Act. In a similar vein, Section 305 requires states, as a condition of federal funding, to give capital defendants the right to a jury instruction about the option of life without parole.
- Section 306 mandates the collection and dissemination of important data about capital punishment in the United States, including statistics regarding the race of defendants and victims.
- Section 307 expresses "the Sense of Congress that the death penalty is disproportionate and offends contemporary standards of decency when



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applied to a person who is mentally retarded or who had not attained the age of 18 years at the time of the offense." This declaration may influence what some hope are the evolving views of the Supreme Court on whether the execution of such defendants constitutes cruel and unusual punishment. Indeed, the Supreme Court will hear a case that raises this very question, *McCarver v. North Carolina*, (00-8727)

The Road Ahead

The mere introduction of so progressive a criminal justice bill should cheer NACDL members, and the breadth of its bipartisan support is cause for further satisfaction. Yet this is not a bill that will gather dust on the congressional shelf — its sponsors are intent on steering it to passage this year, and their likelihood of success is strong.

The first step in the process will be consideration in the House and Senate Judiciary Committees. Each held a hearing on a predecessor version of the IPA last year, so it is likely that one or more hearings will be convened this year. Indeed, the 50-50 split between

Democrats and Republicans in the Senate strengthens the hand of lead IPA sponsor Leahy, who serves as ranking Democrat on the Judiciary Committee. Floor consideration in each body is less certain, although in the Senate the IPA could be offered as an amendment to another piece of legislation if the leadership refuses to allow free standing consideration of the bill. That option is not available in the House, but it is a very good sign that at least one member of the House Republican Leadership — Deborah Pryce of Ohio — has signed on as a cosponsor.

There are two great threats to the bill at this point:

First, opponents of the bill may seek compromises with its proponents. Senator Orrin Hatch, for example, said last year that he would like to enact a DNA bill without counsel provisions. Fortunately, the IPA's sponsors know that DNA is the "low-hanging fruit" of death penalty reform and they are unwilling to settle for such a compromise. They know the limits of DNA testing as a tool for exonerating the innocent, since many cases do not involve biological evidence, and in other cases evidence is not preserved. They also know that the key to

improving the administration of capital punishment is the establishment of federal counsel standards, since effective assistance of counsel is the principal bulwark against wrongful conviction.

Second, the IPA cannot become law without the signature of President Bush. The President and his new Attorney General, John Ashcroft, have both made generally constructive comments in recent months about improvements in the administration of the death penalty. But Bush's disturbing record in Texas looms large — as Governor he presided over the largest and most haphazard capital punishment system in the nation and he even vetoed a modest bill to improve the process by which defense attorneys are appointed in capital cases.

Nonetheless, public opinion is decisively on the side of reform. There is momentum behind the Innocence Protection Act, and each new exoneration fuels the sense that steps must be taken to improve the system. Whether President Bush chooses to lead or to follow, enactment of some meaningful reform is inevitable. The pendulum is swinging back, and the only question is: how far? ↵